

# Opportunities and Challenges for Foreign Undertakings in China's PPPs Market

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# Opportunities and Challenges for Foreign Undertakings in China's PPPs Market

Tongle Si\*

*Public-private partnerships (PPPs) refer to arrangements between the public sector and the private sector, in which they share rewards, responsibilities and risks. PPPs are mainly used to deliver infrastructure and public services. In the recent decade, China has witnessed rapid growth in both the number and investment scale of PPPs projects. With the promotion of sustainable development in the 13<sup>th</sup> Five-Year Plan, the Chinese government starts to take sustainability into considerations when carrying out PPPs projects. Different from traditional command-and-control measures that impose explicit policy orders on private sectors, PPPs function as a market-based instrument (MBI) that gives private sectors a nudge stimulating their innovation in the market competition. In China's PPPs market, the proportion of foreign investment has been declining in recent years. The 14<sup>th</sup> Five-Year Plan released in early 2021 emphasises the importance of involving foreign investors to realise sustainable development goals in the coming five years. The Chinese government has released supplementary rules to strengthen the confidence of foreign investors in Chinese PPPs projects. This article sorts out current regulations that directly affect foreign companies' participation in China's PPPs projects, further exploring both opportunities and challenges for foreign companies to compete in China's PPPs market.*

*Keywords: public-private partnerships, PPPs, foreign direct investment, FDI, sustainable development, China*

## I. Introduction

Public-Private Partnerships (PPPs) refer to arrangements in which the private sector participates in the supply of assets and services traditionally provided by the government. Since its emergence, this cooperation model is usually used in complex projects, especially large-scale infrastructure and public service projects with high technical and financial requirements, such as transport, water and wastewater treatment, solid waste management, healthcare, telecom-

munications, and environmental projects.<sup>1</sup> In the European market<sup>2</sup>, 34 PPPs projects have reached a financial close in 2020, with an aggregate value of €7.9 billion and an average transaction size of €231 million.<sup>3</sup> This investment scale is also common in China's PPPs market. Till the end of 2020, there were 9,954 ongoing infrastructure and public services projects using the PPPs model with an accumulated investment of RMB 15.3 trillion (approximately €2 trillion), with an average transaction size of €200 million.<sup>4</sup> Besides traditional industrial fields, the PPPs

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1 European Commission, 'EU industrial leadership gets boost through eight new research partnerships' (Press release, 17 December 2013) <[http://europa.eu/rapid/press-release\\_IP-13-1261\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1261_en.htm)> accessed 19 November 2021.

2 Defined as EU-27 plus the UK, countries of the Western Balkans and Turkey.

3 European PPP Expertise Centre, 'Market Update: Review of the European PPP Market in 2020' (2021) 1.

4 China Public Private Partnerships Centre [财政部政府和社会资本合作中心], National PPP Comprehensive Information Platform Management November 2020 Report [全国PPP综合信息平台管理2020年11月报] (Annual Report, 30 December 2020) 2-3.

are used in new emerging industrial areas, such as robotics, photonics, high-performance computing, education, entertainment, and media.<sup>5</sup>

PPPs have been proposed by the United Nations as a tool for Sustainable Development Goals.<sup>6</sup> Sustainable development requires the development to meet the needs of the present generation without compromising the ability of future generations to meet their needs. The concept of sustainable development continues to evolve. Besides environmental protection, two more dimensions are derived, namely, economic development and social development. These three dimensions are interdependent and mutually reinforcing. The application of PPPs may facilitate the public sector to use its administrative power to leverage the market sources occupied by the private sector efficiently to maximise both social and economic benefits.<sup>7</sup> With the development of sustainability, PPPs have also derived related concepts, such as green PPPs in environmental areas, people-first in social development, and value for money in the economic aspect. The social and economic benefits brought by PPPs are in line with the requirements of the three dimensions of sustainable development, which are the environment, the economy and society.<sup>8</sup>

As for the economic dimension, PPPs can maximise the *value for money* (VfM) in infrastructure delivery, which means achieving the optimal combination of benefits and costs in delivering the services users want.<sup>9</sup> PPPs are regarded as the most viable way to involve the private sector in building and operating infrastructure.<sup>10</sup> Different from traditional publicly financing infrastructure projects, in PPPs, the financing responsibility may be partially or totally transferred to the private sector, which releases the investment burden of public financing. In this sense, the public sector can mobilise the financial sources occupied by the private sector without increasing public spending. As for the environmental dimension, the concept of Green PPPs is uprising, which includes environmental requirements in public tender documents of PPPs.<sup>11</sup> To achieve goals set in international climate agreements, national governments start to turn to use the private sector capacity in low-carbon green infrastructure.<sup>12</sup> Well-designed PPPs can effectively scale up financing for clean energy internationally and contribute to the battle against climate change.<sup>13</sup> As for the social dimension, the UNECE puts forward the concept of people-first PPPs which focus on improving the quality of life of the communities.<sup>14</sup>

Different from the economic dimension which emphasises 'value for money', the people-first PPPs requires the delivery of infrastructure to realise 'value for people' helping address critical challenges facing humanity, fighting hunger, poverty, and promoting human wellbeing.<sup>15</sup> Precisely, people-first PPPs shall increase access to essential services and lessen social inequity and injustice, enhance resilience and more care with the environment, improve economic effectiveness, promote replicability and the development of further projects, and fully involve all stakeholders in the projects.<sup>16</sup> The social dimension of PPPs includes requires both the economic and environmental expectations of PPPs and put forwards higher requirements on the social outcomes of PPPs projects.

## II. PPPs in China

In the recent decade, China has witnessed rapid growth in both the number and investment scale of PPPs projects. In China, till the end of 2020, there were 9,954 ongoing infrastructure and public ser-

- 5 European Commission (n 3).
- 6 Irina Zapatrina, 'Sustainable Development Goals for Developing Economies and Public-Private Partnership' (2016) 1 EPPPL 39, 45.
- 7 Nannan Wang and Minxun Ma, 'Public-private partnership as a tool for sustainable development – What literatures say?' (2020) Sustainable Development, 2.
- 8 United Nations, *Prototype Global Sustainable Development Report* (Report, 2014).
- 9 The World Bank, *Public-Private Partnerships Reference Guide Version 3* (Reports, 2017) 129.
- 10 Minsoo Lee, Xuehui Han and Raymond Gaspar, Emmanuel Alano, *Deriving Macroeconomic Benefits from Public-Private Partnerships in Developing Asia* (ADB Economics Working Paper Series No. 551, 2018) 16.
- 11 Commission, 'Public procurement for a better environment' (Communication) COM/2008/0400 final; Marlies Hueskes, Koen Verhoest and Thomas Block, 'Governing public-private partnerships for sustainability An analysis of procurement and governance practices of PPP infrastructure projects' (2017) 35 International Journal of Project Management 1184, 1190.
- 12 OECD, *Green Investment Banks: Innovative Public Financial Institutions Scaling Up Private, Low-Carbon Investment* (Environment Policy Papers No. 6, 2017).
- 13 Dharish David, Anbumozhi Venkatachalam, *A Comparative Study on the Role of Public-Private Partnerships and Green Investment Banks in Boosting Low-Carbon Investments* (Asian Development Bank Institute Working Paper Series No. 870, 2018) 4.
- 14 UNECE International PPP Centre of Excellence <<https://www.unecppp-icoe.org/people-first-ppps/what-are-people-first-ppps/>>.
- 15 UNECE, *Draft Guiding Principles on People-First Public-Private Partnerships (PPPs) for the United Nations Sustainable Development Goals (UN SDGs)* (Working Paper, 2018) pt II.
- 16 ibid 5.

vices projects using the PPPs model with an accumulated investment of RMB 15.3 trillion (€2 trillion).<sup>17</sup> There is no absolute 'forbidden area' of PPPs in most public industries.<sup>18</sup> These PPPs projects cover 19 primary industries, including energy, transportation, water conservancy, ecological and environmental protection, municipal projects, urbanisation, agriculture, forestry, science and technology, affordable housing, tourism, healthcare, senior care, education, culture, sports, social security, government infrastructure and others. The top five industries by the project number are municipal projects (4,059), transportation (1,362), ecological and environmental protection (945), urbanisation (626), and education (479), accounting for 75.1% of the total number of projects; the top five industries by cumulative investment are transportation (RMB 5,053 billion (€656.9 billion)), municipal projects (RMB 4,408 billion (€573 billion)), urbanisation (RMB 1,963 billion (€255 billion)), ecological and environmental protection (RMB 1,051 billion (€136 billion)), and tourism (RMB 423.6 billion (€55 billion)), which together account for 84.4% of the total PPPs investment.<sup>19</sup>

With the promotion of sustainable development in China's 14<sup>th</sup> Five-Year Plan, in the first half of 2021, the number of ecological and environmental protection PPPs projects has continued to increase. In the

first half of 2021, there were 182 new pollution prevention and green low-carbon projects with an investment of RMB 181 billion (€23.5 billion) accounting for 31.6% of all new recorded PPPs projects.<sup>20</sup> Moreover, all PPPs projects are required to be conducive to environmental protection, which corresponds to the idea of Green PPPs in preventing pollution and promoting green and low-carbon economic structure. PPPs also effectively helped alleviate poverty to promote rural revitalisation and development. In terms of helping poverty alleviation and rural revitalisation, PPP projects are mainly concentrated in municipal engineering, transportation, energy and other fields. In addition to the dimension of environmental protection, China's sustainable development goals also require poverty eradication and improvement of the living standards of the poor and ultimately achieve the social goal of common development of the whole society. This is in line with the people-first PPPs. In the first half of 2021, there were 70 new PPPs projects in poverty alleviation with an investment of RMB 49.8 billion (€6.5 billion), mainly covering industries of transportation, urbanisation, agriculture, and education.<sup>21</sup>

As for the nationalities of the private sector, both Chinese and foreign undertaking have participated in Chinese PPPs projects, but the proportions are very different. In China's PPPs market, foreign participation is relatively low. According to the data released by the Chinese Ministry of Finance, as of the end of March 2018, more than 1,400 private sector companies have participated in Chinese PPPs projects, of which only 16 are foreign companies.<sup>22</sup> The participation of foreign undertakings accounts for only 6.2% of the market share in China's PPPs market.<sup>23</sup> The proportion of foreign capital flowing into the PPPs is inconsistent with the overall situation of China's utilisation of foreign direct investment (FDI). According to the Statistical Bulletin of FDI in China 2020 released by the Ministry of Commerce, in 2019, there were 40,910 newly established foreign-invested enterprises with the actual use of foreign capital of US\$141.2 billion (€122.7 billion), ranking second in the world in scale and accounting for 9.2% of the total global FDI in 2019.<sup>24</sup> However, most of these investment do not flow in PPPs. From the perspective of industry categories, in 2019, FDI was mainly concentrated in the tertiary industry, with the service industry as the mainstay, and the realised FDI accounted for 69.8%.<sup>25</sup> As we have mentioned, PPPs are mainly used in in-

17 China Public Private Partnerships Centre [财政部政府和社会资本合作中心], *National PPP Comprehensive Information Platform Management November 2020 Report* /全国PPP综合信息平台管理2020年11月报/ (Report, 2020).

18 Ping Pan, Fan Jiang [潘萍, 江帆], *Scope of Application of PPP model for Decision Making [PPP模式适用决策之PPP项目适用范围]*, (Renheren Law Firm [人和人律师事务所], 28 November 2017) <[http://www.sohu.com/a/207078165\\_617153](http://www.sohu.com/a/207078165_617153)> accessed 1 November 2021.

19 China Public Private Partnerships Centre [财政部政府和社会资本合作中心], *National PPP Comprehensive Information Platform Management November 2020 Report* /全国PPP综合信息平台管理2020年11月报/ (Report, 2020).

20 *ibid.*

21 *ibid.*

22 Zhiqiang Wei and Pan Gao [魏志强, 高攀], In the 2.0 era, how can private enterprises participate in PPP projects? [2.0时代, 民企参与PPP项目将何去何从?] <<http://www.zhonglun.com/Content/2018/04-25/1443521889.html>> accessed 1 November 2021.

23 Huihua Nie and Chen Li [聂辉华, 李琛], 'Chinese-style PPP projects: data description and potential problems [中国式PPP项目: 数据描述与潜在问题]', (2019) 74(24) Policy Briefing [政策简报], 9.

24 Ministry of Commerce of the People's Republic of China, *Statistical Bulletin of FDI in China 2020* /中国外资统计公报2020/ (Working Paper, 2020) 1.

25 *ibid.* 19.

infrastructure projects with requirements of fixed assets, such as land use, asset construction and operation. In 2019, the total investment in fixed assets of the society reached US\$8,130.4 billion (€7,073 billion), however, the proportion of realised FDI only accounts for 1.7% of the total investment in fixed assets.<sup>26</sup>

At the initial stage of PPPs development, from 1994 to 2003, when the Chinese government explored the cooperative model with the private sector to deliver infrastructure and public services, the FDI was an important source of capital for China's infrastructure construction.<sup>27</sup> At this phase, transportation, energy, water and garbage disposal projects were the main sectors adopting PPPs. Examples of such projects include the Jiaosha B Power Plant in Shenzhen (1985), the Sixth Water Plant in Chengdu (1996), the Dachang Water Plant (1996), Highway from Guangzhou to Shenzhen (1997), the Tenth Water Plant in Beijing (1999), and Tunnel Project in Dalian (2001).<sup>28</sup> In recent decades, China has witnessed significant progress in both economic and social development. However, compared to developed countries, the Chinese public sector still faces many issues regarding the construction and operation of urban environmental infrastructure facilities, including a shortage of investment funds, high costs and low returns of operation, low operational efficiency, waste of human and technological resources, and bureaucracy and political interventions under public management.<sup>29</sup> According to the 2016 infrastructure investment forecasts for China carried out by the Infrastructure Outlook, the investment offer was lower than the investment needs.<sup>30</sup> The investment gap was about 0.36% of China's GDP, which amounts to US\$1.9 trillion (€1.6 trillion). To overcome these problems, the Chinese government actively welcomes foreign companies to invest in China. One essential effort undertaken by the Chinese government is to revise its regulatory framework for PPPs to provide foreign companies with more guarantees for legal certainty.

### III. The Regulatory Framework for PPPs in China

The maximisation of PPPs benefits for sustainability demands a sound legal framework.<sup>31</sup> According to the assessment carried out by the World Bank of the regulatory quality to prepare, procure and manage PPPs, the score of PPPs in China is above the average level

in preparation, procurement, and contract management.<sup>32</sup> As we have mentioned, a PPP project involves complicated long-term transactions that are affected by many areas of law, such as public procurement law, contract law, administrative law, and even criminal law. Generally speaking, specific regulations on PPPs or laws relating to legal relationships in PPP projects, such as the public procurement law or PPP law, are of higher relevance and importance than laws that are triggered by participants' disputes, such as criminal law and tort law as they are general in nature and mainly relate to *ex post* problems and not to the creation and content of PPPs as such. Currently, in China, there is no specific regulation on PPPs. The pillars supporting the regulatory framework applying to PPPs in China are the Government Procurement Law of the People's Republic of China<sup>33</sup> (Government Procurement Law), the Bidding Law of the People's Republic of China<sup>34</sup> (Bidding Law), and the Foreign Investment Law of the People's Republic of China<sup>35</sup> (Foreign Investment Law). The Government Procurement Law regulates activities of the public sectors in the procurement of supplies, works, and services with public fiscal funds by way of contracts, including pur-

26 *ibid* 3.

27 Ministry of Foreign Trade and Economic Cooperation [对外贸易经济合作部], *Circular of the Ministry of Foreign Trade and Economic Cooperation on the absorption of foreign investment by BOT* [对外贸易经济合作部关于以BOT方式吸收外商投资有关问题的通知] (Government Working Paper 1995).

28 Bridata [明树数据], *Development Process and Characteristics Analysis Report of the Chinese PPP Market (1984-2017)* [中国PPP发展历程及特征分析(1984-2017)] <<https://www.bridata.com>> accessed 30 October 2021.

29 Asian Development Bank, *Market-Based Instruments for Water Pollution Control in the People's Republic of China* (Working Paper, 2011) 6.

30 Infrastructure Outlook, 'China' <<https://outlook.gihub.org/countries/China>> accessed 15 October 2021.

31 Joop FMKoppenjan, 'Public-Private Partnerships for green infrastructures. Tensions and challenges' (2015) 12 *Current Opinion in Environmental Sustainability* 30, 34.

32 The World Bank, *Benchmarking Infrastructure Development 2020: Assessing Regulatory Quality to Prepare, Procure, and Manage PPPs and Traditional Public Investment in Infrastructure Projects* (Working Paper, 2020).

33 Government Procurement Law of the People's Republic of China (2014 Amendment) [Effective] 中华人民共和国政府采购法(2014修正) [现行有效].

34 The Bidding Law of the People's Republic of China (2017 Amendment) [Effective] 中华人民共和国招标投标法(2017修正) [现行有效].

35 Foreign Investment Law of the People's Republic of China [Effective] 中华人民共和国外商投资法 [现行有效], Order No. 26 of the President of the People's Republic of China, adopted on 15 March 2019 and come into force on 1 January 2020.

chasing, leasing, entrusting, employing, within the territory of the People's Republic of China.<sup>36</sup> The Bidding Law regulates the *bidding* process (also called *tendering*) to select a suitable undertaking to deliver supplies, works, or services through competition in the open procedure and restricted procedure. The Foreign Investment Law confirms the activities the foreign investment can undertake within the mainland territory of China, stipulates the rights that foreign investment can enjoy and establishes mechanisms for complaints if these rights are violated, removes previous legal and administrative restrictions on foreign investment enterprises, and offers possibilities for the foreign investment to participate in the formulation of regulations relating to foreign investment. These apply together with a large number of administrative rules released by the central government on specific issues relating to the implementation of PPPs projects, which apply to all Chinese projects. China is also committed to promulgating a specific PPP regulation. In 2017, the central government issued the Regulation on Government and Social Capital Cooperation in the Field of Infrastructure and Public Services (draft) which is expected to be the overarching regulation on PPPs (being lower than law but higher than administrative rules). According to the legislative work plan of the central government, the official version was expected to be released in 2018.<sup>37</sup> However, due to the disagreement of scholars and practitioners on the content, this draft regulation is still under revision with no official news on its publication.

Internationally, on 15 November 2020, China signed the Regional Comprehensive Economic Partnership Agreement (RCEP), which is the first time that China includes government procurement rules

in a plurilateral agreement. RCEP has 15 member countries - the 10 ASEAN countries<sup>38</sup>, China, Japan, South Korea, Australia, and New Zealand. The RCEP agreement consists of a preamble, 20 chapters, and 4 appendices to the market access commitment table. Among the 20 chapters, Chapter 16 is related to government procurement, with a total of 8 articles. This chapter not only includes content such as information exchange and cooperation, technical assistance, and capacity building but also adds deliberation clauses to reserve discretion for all parties to further enrich and improve this chapter in the future. RCEP will promote all parties to strengthen the exchange and cooperation of government procurement information at a higher level and in a wider range, which is conducive to enhancing the transparency of the government procurement management system of all parties, and lays a foundation for promoting the gradual opening of the government procurement market in the region. RCEP makes it possible for companies in member states to enter China's PPPs market. However, the agreement also has limitations. First, the agreement is limited to the principles of transparency and cooperation in terms of government procurement. Secondly, the agreement is only applicable to government procurement-related laws, regulations and procedures implemented by a party's central government entity, and is not directly applicable to local governments. Thirdly, the RCEP's government procurement rules are mainly in principle, and there is no clear market access list.

Moreover, to promote access to other markets, countries often resort to a bilateral free trade agreement (FTA). For example, all EU Member States have bilateral investment agreements with China.<sup>39</sup> Foreign countries can enter into FTAs with China regarding public procurement. For example, in the China-Switzerland FTA and the China-Iceland FTA, the parties agree to cooperate in public procurement, change information, and publish their laws on public procurement.<sup>40</sup>

## IV. Opportunities for Foreign Undertakings

### 1. Optimised Policy Environment

The development of the PPPs market benefits from a stable social, business, and legal environment. A

36 Government Procurement Law of the People's Republic of China, art 2.

37 State Council of the People's Republic of China, *State Council's 2018 Legislative Work Plan* [国务院2018年立法工作计划] (Issue No. 14, 2018).

38 The Association of Southeast Asian Nations (ASEAN) is an inter-governmental organisation of ten Southeast Asian countries: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

39 List of the bilateral investment agreements is referred to in art 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2018] OJ C 149.

40 European Parliament, *Openness of Public Procurement Markets in Key Third Countries* (Directorate-General for External Policies, 2017) 36-37.

report by the World Bank in 2020 showed that China has become a leading reformer among large economies in improving its business environment, ranked among the top 10 fastest global reformers for two years in a row, made a dramatic jump from the 78th position in the World Bank's 2018 report to 31st in last year's ranking in the ease of doing business ranking.<sup>41</sup> China is also the first country to overcome the impact of the epidemic and achieve positive economic growth. The prime minister announced for the year 2021 a growth rate target above 6% and the IMF announced a GDP growth forecast of 8.1%.<sup>42</sup> This stable business environment is shaped by the guidance of policies.

At the beginning of 2021, the Chinese government released the 'Outline of the 14th Five-Year Plan (2021-25) for National Economic and Social Development and Long-range Objectives Through 2035', in short the 14<sup>th</sup> Five-Year Plan (14<sup>th</sup> FYP, or the Plan). This 142-page plan consists of 19 chapters and 65 sub-chapters. The 14<sup>th</sup> FYP clarifies the direction for economic and social development in the coming five years, from 2021 to 2025, with an emphasis on sustainable development. In line with the theoretical advances of the concept of sustainable development, the 'sustainable' notion upraised by the Chinese government emphasise the interaction among three dimensions, namely environmental, social and economic issues.<sup>43</sup> In the further explanation of each dimension, the Plan sets specific goals. For example, in the environmental commitments, the Chinese government pledges to reduce energy consumption and carbon dioxide emissions per GDP unit by 13.5% and 18% respectively, reaching peak carbon emissions by 2030 and achieving carbon neutrality by 2060.<sup>44</sup> In terms of social issues and people's livelihood, the urbanisation rate of the permanent population is required to be increased to 65%, to ensure higher-quality employment, and to control the urban unemployment rate within 5.5%.<sup>45</sup> In terms of economy, the government will continue to promote the reform of the property rights system and the market-oriented allocation, improve the fair competition system, and form a higher-level open economic system.<sup>46</sup>

Effectively integrating foreign undertakings into China's economic development is also an important part of the 14<sup>th</sup> FYP. Efforts to introduce foreign market forces to the domestic infrastructure market date back to 1978 with the release of the Reforming and Opening Up Policy. According to the 14<sup>th</sup> FYP, one of

China's 2035 goals is to ensure the opening-up to 'a new stage'. The focus of the policy towards mobilising FDI lies in furthering two-way opening up of financial markets, strengthening trade competition, and improving international cooperation. In the 14<sup>th</sup> FYP, the Chinese government does not only set targets for the coming five years but also pre-determine policy priorities. Among these policy priorities, many policies indicate China's foreign policy orientation, providing guidelines for foreign companies and governments which plan to invest in the Chinese market. They encourage private sectors to provide innovative productions and solutions in industries, such as the infrastructure sector, consumer products, and waste management, which are also critical levers to support the industry upgrade plans.<sup>47</sup> Moreover, in February 2021, the Ministry of Commerce set out 22 specific measures aimed to stabilise foreign investment in 2021.<sup>48</sup> This regulatory document stipulated that more government support shall be given to speed up the development of foreign investment projects, covering aspects of land use rights, energy projects and financial resources.

## 2. Optimised Legal Environment

The most eye-catching action undertaken by the Chinese government to stabilise foreign investment was the publication of the Foreign Investment Law in 2019. The Foreign Investment Law legally recognis-

41 World Bank Group, *Doing Business 2020: Comparing Business Regulation in 190 Economies* (Report, 2020) 4.

42 World Economic Outlook, *October 2020: A Long and Difficult Ascent* (Report, 2020) 9.

43 Isabella Neuweg and Nicholas Stern, 'China's 14th Plan, sustainable development and the new era' (Paper for the 20th China Development Forum, May 2019) 2-3.

44 National People's Congress, *14th Five Year Plan and long-term targets for 2035* [中华人民共和国国民经济和社会发展第十四个五年规划和2035年远景目标纲要] (Policy, 2021) 8.

45 *ibid* 7.

46 *ibid*.

47 CGTN, 'China releases guideline to advance a green, low-carbon economy' (News, 23 February 2021) <<https://news.cgtn.com/news/2021-02-23/China-releases-guideline-to-advance-a-green-low-carbon-economy-Y7jqklsPcl/index.html>> accessed 19 November 2021.

48 Ministry of Commerce of the People's Republic of China, *Notice on Stabilizing Foreign Investment to Establish a New Economic Development Pattern* [关于围绕构建新发展格局做好稳外资工作的通知] (Working Paper, 2021).

es the rights enjoyed by foreign investors in China. Through setting rules on investment promotion, investment protection, and investment management, this law aims to create a stable, transparent, and predictable investment environment. The Foreign Investment Law is mainly embodied in the following three aspects.

Firstly, the Foreign Investment Law guarantees wider market access for foreign investment. To remove market entry barriers that prevent foreign investors from entering the Chinese market, the Foreign Investment Law comes up with the adoption of a *pre-entry national treatment* regime with a *negative list*.<sup>49</sup> The *pre-entry national treatment* means that the foreign investors and their investments will enjoy no less favourable treatment than then Chinese investors, during the investment access stage. With this equal treatment, the foreign investment will no longer be subject to project-by-project prior approval from Chinese authorities. The negative list formulated by the central government includes the industries that the foreign investors are not allowed to enter; and in industries outside the negative list, the foreign investment can enjoy the national treatment.<sup>50</sup> The central government can adjust the negative list in accordance with economic and social development and the needs of further opening up.<sup>51</sup> The entrance control of the Chinese market is a dynamic process with the overall trend to reach further opening up. The most recent version of the negative list is issued in

2021, including 31 specific industries in 12 major fields.<sup>52</sup> Together with the negative list, the Chinese government also has 'Catalogue of Industries Encouraging Foreign Investment (2020 Edition)'.<sup>53</sup> Foreign investment projects that belong to the Catalogue can enjoy preferential treatment such as taxation and land use. The latest version of this Catalogue covers 1,235 industrial areas. Besides traditional industries applying PPPs, the catalogue also encourages cooperation between the public sector and the private sector in new infrastructure areas, such as the transformation and integration of digital production lines, cross-border e-commerce retail, commodity import and export distribution centres, and community chain distribution.

Secondly, foreign-invested enterprises can enjoy equal treatment with domestic enterprises in many aspects. Article 9 in the Foreign Investment Law and Article 6 in its Implementing Regulation stipulate that foreign investors shall be treated equally with domestic enterprises in such aspects as access to government funds, land supply, tax and fee reduction and exemption, qualification licensing, project applications and so on.<sup>54</sup> The Foreign Investment Law specifically mentions government procurement, which emphasises that foreign-invested enterprises can participate in government procurement through fair competition.<sup>55</sup> As long as products manufactured or services performed by foreign-invested enterprises in China, they shall be treated equally with pure domestic products and services.<sup>56</sup> The department in charge of the procurement shall not apply differential or discriminatory treatment to foreign-invested enterprises in terms of government procurement information release, supplier qualification determination, qualification review, and bid evaluation standards.<sup>57</sup> It is also forbidden to limit the suppliers by imposing requirements of ownership form, organisational form, equity structure, country of investor, product or service brand, and other unreasonable conditions.<sup>58</sup> If foreign-invested enterprises claim rights violated in the procurement, they can raise inquiries and doubts to purchasers and procurement agencies, and lodge complaints with the government procurement supervision and management department, according to the Government Procurement Law.<sup>59</sup> The equal treatment granted to the foreign-invested enterprises in the Foreign Investment Law seems to conflict with the 'Buy Chinese Policy'<sup>60</sup> in Government Procurement Law which requires

49 Foreign Investment Law, art 4.

50 Foreign Investment Law, arts 4 and 28.

51 Regulation for Implementing the Foreign Investment Law, art 4.

52 National Development and Reform Commission of the People's Republic of China, Ministry of Commerce of the People's Republic of China, *Special Management Measures for Foreign Investment Access (Negative List) (2020 version)* /《外商投资准入特别管理措施（负面清单）（2021年版）》(Order No. 47, 2021).

53 National Development and Reform Commission of the People's Republic of China, Ministry of Commerce of the People's Republic of China, *Catalogue of Industries Encouraging Foreign Investment (2020 Edition)* /《鼓励外商投资产业目录（2020年版）》(Order No. 38, 2020).

54 Foreign Investment Law, art 9; Regulation for Implementing the Foreign Investment Law, art 6.

55 Foreign Investment Law, art 16.

56 Regulation for Implementing the Foreign Investment Law, art 15.

57 *ibid.*

58 *ibid.*

59 Regulation for Implementing the Foreign Investment Law, art 16.

60 Government Procurement Law, art 10.

procuring authority to purchase domestic products. With the opening up of government procurement in this newly released law, it can be expected that the Government Procurement Law will undergo a revision to keep the consistency of the legal system.

Thirdly, the Foreign Investment Law recognises the legal right of foreign companies to participate in the formulation of rules. When formulating laws, regulations, and rules related to foreign investment, the legislative body shall consult the opinions and suggestions of foreign-invested enterprises.<sup>61</sup> Moreover, when setting industrial standards, the government is also required to guarantee the equal participation of foreign undertakings.<sup>62</sup> In this sense, the foreign undertakings will not only be participants in China's market but also rule-makers to promote the improvement of China's foreign investment market.

Together with the release of the Foreign Investment Law, China also released the Measures for the Security Review of Foreign Investment in 2020.<sup>63</sup> There are two major categories of foreign investments that fall within the scope of review, which are the military industry relating to national defence security and investment in essential industries related to national security.<sup>64</sup> Regulated in accordance with the Foreign Investment Law, the review aims to effectively prevent national security risks while actively promoting foreign investment.

### 3. Efforts to Participate in International Agreements

In addition to actively improving the domestic foreign investment regulatory framework, China has also actively joined international agreements to open up its domestic market to foreign undertakings.

China keeps making efforts to join the Agreement on Government Procurement (GPA). According to the WTO principles governing international trade, protectionist measures which may cause discrimination are not allowed. But it leaves discretion for member states to regulate domestic government procurement which was excluded from basic WTO non-discrimination obligations in both the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).<sup>65</sup> To mutually open government procurement markets, many WTO members have negotiated the Agreement on Government Procurement (GPA). GPA is a bilateral international

agreement which means that it only binds WTO members who have signed this agreement.<sup>66</sup> The GPA applies to the public procurement carried out among its members. However as China is not a member of the GPA, members of GPA cannot claim the application of GPA when conducting public procurement with China. China started negotiations to join the Agreement on Government Procurement (GPA) at the end of 2007. In May 2015, the Chinese emphasises the determination to establish an open market economy and clearly propose to speed up the negotiation of GPA.<sup>67</sup> At the Boao Forum for Asia in 2018, President Xi Jinping pointed out in his opening speech that China will speed up the process of joining the GPA and regard it as one of the four major measures to actively expand imports. Joining the GPA negotiation involves two aspects: the scope of market opening and the adjustment of domestic laws. Among them, the open scope of the government procurement market is determined through negotiation by each participant in the form of a bid list. Since 2007, China has submitted six bid lists, none of which have resolved the issue of China's accession to the GPA. Although the scope of government procurement is continuously expanded, due to the large differences between the domestic government procurement system and the GPA, there have been many disputes over how to include state-owned enterprises under the jurisdiction of the GPA and how to further improve the bid list.<sup>68</sup>

Moreover, China formally submitted a written letter to apply to join the Comprehensive and Progres-

61 Foreign Investment Law, art 10.

62 Foreign Investment Law, art 15.

63 National Development and Reform Commission of the People's Republic of China and the Ministry of Commerce of the People's Republic of China, *Measures for the Security Review of Foreign Investment* [外商投资安全审查办法] (Order No. 37, 2020).

64 Measures for the Security Review of Foreign Investment, art 4.

65 General Agreement on Tariffs and Trade (GATT) 1994, art III.8, XVII.2; General Agreement on Trade in Services (GATS) art XIII.1.

66 The Agreement on Government Procurement (GPA 2012) consists of 21 parties (including 48 WTO members, counting the European Union and its 27 member states as one party).

67 Central Committee of the Communist Party of China and the State Council, *Several Opinions on Building a New System for an Open Economy* [关于构建开放型经济新体制的若干意见] (Working Paper, 2015).

68 Xiaoyong He [贺小勇], 'Legal Advices on China's Accession to the Government Procurement Agreement as Soon as Possible [中国尽早加入《政府采购协定》的法律建议]' (2009) 6 Business and Economic Law Review [经贸法律评论] 13, 21.

sive Trans-Pacific Partnership Agreement (CPTPP) on 16 September 2021. CPTPP is the first large-scale free trade agreement in the trans-Pacific region which came into effect on 30 December 2018. It includes 11 countries: Japan, Canada, Australia, Chile, New Zealand, Singapore, Brunei, Malaysia, Vietnam, Mexico, and Peru, accounting for 13.2% of the global economy and a market of 500 million people.<sup>69</sup> With 30 chapters, the CPTPP covers a large number of topics, such as intellectual property agreements, competition neutrality, e-commerce, government procurement. Chapter 15 and 24 articles are specifically designed to clarify matters related to government procurement, which regulates a wide range of issues, such as general rules, exceptions, announcement of procurement information, bidding and awarding of contracts, and facilitating the participation of small and medium-sized enterprises. The content of government procurement in CPTPP is mainly based on the World Trade Organization's Government Procurement Agreement, with only a few additions or deletions in some provisions. The high open standards embodied in the CPTPP agreement are consistent with China's goal of building a new open economy system and promoting the integration of domestic systems with international rules. The requirements of CPTPP and GPA can speed up China's effort to revise its current government procurement regulations.

Besides actively joining international agreements, China is also pursuing FTAs with its main economic partners. In 2013, the EU and China started negotiations for an Investment Agreement, the Compre-

hensive Agreement on Investment (CAI), and concluded the negotiations at the end of 2020. Although government procurement is specifically not included in the results of negotiations.<sup>70</sup> The CAI guarantee market access and investment liberalisation for investors to enter each other's PPPs market as in China the access of foreign enterprises to its domestic PPPs market are not only governed by the public procurement regulatory framework but also laws regulating the foreign investment. Although CAI has not formally taken effect, the mutual opening up between China and the EU looks set to continue.

#### 4. Other Measures

China has established 21 free trade zones (FTZ) within its territory with a preferential policy for foreign investment.<sup>71</sup> In these FTZs, foreign goods can enter and exit freely without tariffs. Moreover, foreign undertakings may enjoy other benefits, such as lower corporate tax rates, free currency exchange rate (no fees for converting major currencies), and faster VAT refund.<sup>72</sup> In China, an important task of these FTAs is to test whether international rules are applicable to the Chinese economy. Take the foreign management system, for example, the Shanghai Pilot Free Trade Zone was the first to introduce the management method of 'pre-establishment national treatment + negative list' and replicated it nationwide. With a more relaxed investment environment, these FTZs are highly attractive to foreign investors.

Moreover, the government also has taken other measures to facilitate the foreign company to participate in PPPs. For example, nationwide, besides the national PPP centre established by the Ministry of Finance, 19 provinces (among a total of 34 provinces) have established provincial PPPs centres. Usually, these PPPs centres are established by the governments which is the main component of the public sector. However, stripped of administrative functions, these PPP centres mainly facilitate both the public sector and the private sector in adopting PPPs. For example, the private sector can refer to the PPPs centres for consulting current policies and legal regulations on PPPs; and the public sector can also ask the centre to investigate the development situation of regional and national PPPs markets. Forbidden to represent either the public or the private sector in the specific implementation process, these PPPs cen-

69 Department of Foreign Affairs and Trade of Australian Government, 'Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP)' (*Trade and Investment*, 2021) <<https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf>> accessed 16 October 2021.

70 European Commission, *EU-China Comprehensive Agreement on Investment: The Agreement in Principle* (Working Paper, 2020) 2.

71 The 21 FTZs are Shanghai Free Trade Zone, Guangdong Free Trade Zone, Tianjin Free Trade Zone, Fujian Free Trade Zone, Chongqing Special Economic Zone, Sichuan Free Trade Zone, Shaanxi Special Economic Zone, Henan Free Trade Zone, Zhejiang Free Trade Zone, Hubei Free Trade Zone, Liaoning Special Economic Zone, Hainan Free Trade Port, Jiangsu Free Trade Zone, Shandong Free Trade Zone, Hebei Free Trade Zone, Heilongjiang Free Trade Zone, Guangxi Free Trade Zone, Yunnan Free Trade Zone, Beijing Free Trade Zone, Anhui Free Trade Zone, and Hunan Free Trade Zone.

72 FDI China, 'FDI China Exclusive: The 21 Free Trade Zones Guide 2021' (*Policy*, 26 May 2021) <<https://www.fdicchina.com/blog/fdi-china-exclusive-the-21-free-trade-zones-guide-2021/>> accessed 15 August 2021.

tres function to bridge the information asymmetry between the public sector and the private sector.

## V. Obstacles for Foreign Undertakings

### 1. Limitations in Current Regulatory Framework

Compared with China's policy of actively attracting foreign investment to participate in PPPs projects, the current regulatory framework of PPPs cannot fully meet the requirements of foreign undertakings to enter China's PPPs market.<sup>73</sup> As we have mentioned, the pillars supporting the regulatory framework applying to PPPs in China are the Government Procurement Law, the Bidding Law and the Foreign Investment Law. All these three laws have limitations in regulating the entry of foreign undertakings into the PPPs market.

PPPs do not satisfy the essential condition to trigger the application of Government Procurement Law. The Government Procurement Law is of specific application to the conventional public procurement using public fiscal funds which are arranged in the budget. As we have analysed the characteristics of PPPs, private financing is the main source of PPPs project investment, which is not included in the budget. In this sense, PPPs does not satisfy the application basis of the Government Procurement Law. Moreover, the Government Procurement Law gives priority to domestic supplies, works and services with the exception of limited circumstances, such as, where the item cannot be obtained within the territory of China or cannot be obtained under reasonable commercial conditions, or where the procurement is made for the use without the territory of China, or other situations recognised by laws.<sup>74</sup>

The Bidding Law cannot fully cover the whole life cycle of a PPP project. Usually, a PPP project includes several stages, including project identification, preparation, procurement, execution and transfer, also known as *the whole life cycle of PPPs*.<sup>75</sup> The Bidding Law only specifies requirements of activities in the bidding stage carried out in the procurement procedure. As for other stages, participants shall refer to other regulations.

The Foreign Investment Law is believed to respond to the typical concerns of foreign investors. However, the vague expression in the provisions may

bring new difficulties for foreign enterprises operating in China. For example, the Foreign Investment Law forbids forced technology transfer by 'administrative means,' but does not define what 'administrative means' are, which cannot avoid risk in practice that the government may apply non-administrative measures to acquire technology from foreign-invested enterprises.<sup>76</sup> Moreover, supplementary legal protection of the intellectual property is still questioned for lacking effective rules to protect foreign undertakings' IP.

### 2. Barriers in the PPPs Market

In China's PPPs market, state-owned enterprises (SOEs) often enjoy dominant positions which makes private and foreign companies difficult to win in the project bidding. From 2014 to 2017, private enterprises participated in 1898 PPPs projects with a cumulative scale of 1.48 trillion yuan, while state-owned enterprises won 2064 projects, with a scale of 4.45 trillion.<sup>77</sup> According to the quarterly report on PPPs in China, it says that till the end of December 2017, 981 private sectors participated in the PPPs projects, among which there are 569 state-owned enterprises.<sup>78</sup> The scale of participation by state-owned enterprises is three times that of private enterprises. The extensive involvement of SOEs in PPPs projects is criticised as 'public-public partnership' instead of 'public-private partnership'.

73 Toriqlu Bashar et al, 'Major Obstacles to Public-Private Partnership (PPP)-Financed Infrastructure Development in China' (2021) 13 Sustainability, 5.

74 Government Procurement Law, art 10.

75 Zhenzhen Song [宋珍珍], 'Full process interpretation of PPP project implementation' [PPP项目实施全流程解读] (*Public private partnerships*, 29 September 2016) <<http://www.chinacem.com.cn/ppp-czsw/2016-09/215743.html>> accessed 30 July 2021.

76 Qian Zhou, 'China's New Foreign Investment Law: A Backgrounder' (*News*, 17 October 2019) <<https://www.china-briefing.com/news/china-new-foreign-investment-law-backgrounder/>> accessed 15 August 2021.

77 Liu Yang [杨浏], 'The scale of state-owned enterprises' participation in PPP is three times that of private enterprises Expert: Increase foreign participation of private enterprises' [国企参与PPP规模为民企3倍 专家:提高民企外资参与度] (*News*, 11 July 2018) <<https://bit.ly/3sq2j3L>> accessed 29 July 2021.

78 China Public Private Partnerships Centre [财政部政府和社会资本合作中心], *Quarterly Report on the Project Database of the National PPP Integrated Information Platform (No. 9)* [National PPP Comprehensive Information Platform Management November 2020 Report /全国PPP综合信息平台项目库第9期季报] (Report, 26 January 2018).

To prevent the SOE from monopolising PPPs, there are restrictions on the SOE to participate in PPPs as the private sectors. In 2019, the MoF decides to revise its Operational Guidelines of the Government and Social Capital Cooperation Model (Trial)<sup>79</sup>, which is known as the Guidelines for the Operation of Government and Social Capital Cooperation Models (Revised Draft).<sup>80</sup> In the Revised PPPs Guidelines, it forbids the enterprise controlled by the government to participate in PPPs initiated by the same government as the private sector. Under these requirements, to prevent the government from influencing activities of the SOE at the same level which may distort the market competition, it is forbidden for the SOE to participate in PPPs initiated by the same government as the private sector. But it is still possible for the SOE to participate in PPPs projects held by governments at other levels or governments at the same level but in different administrative regions. It is undeniable that in the long-term operation, SOEs have accumulated a large number of advantages, such as capital advantages, technological advantages, scale advantages, and credit advantages.<sup>81</sup> State-owned enterprises are usually large-scale and possess both advanced technology and strong financial strength. Local governments often give priority to state-owned enterprises when selecting the private sectors in PPPs projects.

Moreover, local governments still favour local companies intentionally or unintentionally, even though governments at all levels in China take positive and open attitudes welcoming foreign undertakings to participate in PPPs projects. Different from general investment promotion projects that focus on attracting capital, PPPs require the private sector to

enter into a long cooperative relationship with the public sector. In other words, if the PPP model is adopted to attract foreign investment, then local governments need to be prepared for long-term cooperation with foreign investors, which imposes a big challenge to the governance abilities of local governments. Therefore, it is not ruled out that when facing domestic and foreign undertakings, local governments will unconsciously tend to choose domestic ones.

## VI. Conclusion

Affected by the epidemic, the world economy has experienced regression. How to integrate and use resources more effectively to achieve sustainable development is a problem faced by all countries in the world. In addition to traditional administrative methods, market-based instruments (MBIs) are effective tools to achieve sustainable development. As an efficient MBI, the PPPs make it possible to maximise the benefits occupied by the public and private sectors through establishing a long and close cooperative relationship. The concept of sustainable development has been incorporated in PPPs to stimulate the private sector to provide effective and energy-efficient problem-solving methods through market competition. China has a huge domestic market and is attractive to foreign investment. Foreign investment used to be also an essential power to promote the development of PPPs in China. However, the proportion of foreign undertakings participating in PPPs continues to decrease. The Chinese government has adopted active policies towards foreign undertakings to participate in China's PPPs market. Besides continuously improving domestic regulatory frameworks of PPPs to guarantee legal certainty to foreign undertakings, China actively participates in international treaties to improve the openness of the domestic market. However, it should be noted that in current laws and practices, there are still obstacles preventing foreign undertakings from entering China's PPP market. How to eliminate these obstacles and create an investment-friendly environment for foreign undertakings will be a problem that China needs to solve in its future PPPs development.

79 Ministry of Finance of the People's Republic of China, *Guidance to the Operation of the Government and Social Capital Cooperation Model (Trial Implementation)* (财政部政府和社会资本合作模式操作指南(试行)) (Order No. 113, 2014).

80 Ministry of Finance of the People's Republic of China, *Letter asking for comments on the 'Guidelines for the Operation of Government and Social Capital Cooperation Models (Revised Draft)* (关于征求《政府和社会资本合作模式操作指南(修订稿)》意见的函), (Order No. 94, 2019).

81 Jie Sun [孙洁], 'Opportunities and Challenges for State-owned Enterprises to Participate in PPP' (国有企业参与PPP的机遇与挑战) (2017) 11 China State-Owned Enterprise Management [国企管理], 28-29.